SUPREME COURT, U. S.

FILED

MAY 10 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1684

ERNEST L. GARNER

Petitioner,

versus

THE LOUISIANA STATE BOARD OF EDUCATION, ET AL.

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit

ERNEST L. GARNER, Pro Se
3957 Scenic Highway
Baton Rouge, Louisiana 70807

Printing Corp. Inc. Baton Rouge, La.

INDEX

	Page
Opinions	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions	3
Statement of Facts	4
Reasons for Granting the Writ	7
Conclusion	12
Certificate	13

TABLE OF AUTHORITIES AND CASES

Section I, Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. Section 1983	3
28 U.S.C. 1343	2, 4
Bettye Joe Baker, et al. v. Columbus Municipal Separate School District, et al., 329 F. 706 (1972)	7
Slochower v. Board of Higher Education, 305 U.S. 551 (1956)	8

Page

Ferguson v. Thomas, 430 F.2d; 852 (5th Cir. 1970) 9

C. F. Tichon v. Harden, 438 F.2d 1396 (2nd Cir. 1971) 9

Griffin v. Illinois, 351 U.S. 12 (1956) 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. _____

ERNEST L. GARNER

Petitioner,

versus

THE LOUISIANA STATE BOARD OF EDUCATION, ET AL,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals, Fifth Circuit

The petitioner, Ernest L. Garner, Pro SE, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on February 7, 1974.

OPINIONS BELOW

The petition for certiorari in this case arises out of the dismissal of the appellant's civil rights suit in Federal Court under the doctrine of res judicata. The opinion of the Louisiana 19th Judicial District Court for the Parish of East Baton Rouge rendered November 3, 1972, is reprinted herein as Appendix A. The opinion of the Louisiana Court of Appeal for the First Circuit rendered on April 9, 1973 is reported at (277 So.2d 492) 1973 and is reprinted herein as Appendix B. The order of the Louisiana Supreme Court dated June 29, 1973, denying a Writ of Review is reprinted as Appendix C. The judgment of the United States District Court for the Middle District of Louisiana dated September 7, 1973 is reprinted herein as Appendix D. The judgment of the United States Court of Appeals for the Fifth Circuit dated February 7, 1974 (328 (3.10)) is reprinted herein as Appendix E. The order of the United States Court of Appeals for the Fifth Circuit dated March 5, 1974, denying a rehearing is reprinted as Appendix F.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit dated February 7, 1974. See Appendix E. The order denying a rehearing dated March 5, 1974. See Appendix F. The appellant's petition for certiorari to this Court was filed less than ninety (90) days after March 5, 1974. See Rule 22, Rules of the Supreme Court of the United States. The jurisdiction of this Court invoked under 28 U.S.C. 1343.

QUESTIONS PRESENTED

Whether the Court below erred in not determining that

the (Fourteenth) Amendment governs any action of a State; whether through its legislature, through its courts, or through its executive or administrative officers?

Whether a State Court decision under the color of State laws can be a bar to a Federal Court Civil Rights suit under the doctrine of res judicata.

CONSTITUTIONAL PROVISIONS

The command of the Fourteenth Amendment is:

> "No state shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Congress provided the Act of 1871, to enforce the provisions of the Fourteenth Amendment that:

> "Any person who under color of any law, statute, ordinance, regulation, custom or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to be deprived of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or Circuit Courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, render the provisions of the act of

the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication,' and the other remedial laws of the United States which are in their nature applicable in such case."

Congress also provides section 1343 of the U. S. Code, Title 28; entitled Judiciary and Judicial Procedure.

"Civil rights and elective franchise;

"The district Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress provided for equal rights of citizens or of all persons within the jurisdiction of the United States."

STATEMENT OF FACTS

The appellant, Ernest L. Garner, a black vocational technical (Trade) school teacher was suspended and fired by the school director for refusing to take a "general aptitude" test administered by the school's guidance counselor.

To get the approval of the Louisiana State Board of Education for firing Garner, the school director submitted a fraudulent resignation form to the board of education indicating that Garner had resigned. The State Board of Education approved this resignation of Garner, the appellant.

Garner, unaware of the actions the school director or the Board of Education had taken, wrote a letter to the Board of Education giving them a detailed account of what had transpired. The appellant also requested a hearing. The State Board of Education did not correct the situation, nor gave Garner a hearing.

The appellant filed an action on a Contract of Employment in the Louisiana State District Court. Garner alleged in his petition in the Louisiana District Court that by letter dated June 30, 1969, Garner was advised by Elijah Reed, director of the Evangeline Area Tri-Parish Vocational School (Trade), St. Martinville, Louisiana, that appellant's services would be terminated as of June 30, 1969.

Garner also alleged that under the controlling statute covering the operation of vocational teachnical schools and the terms of office of teachers at said schools, the sole authority for employment and termination rests with the Board of Education of the State of Louisiana (p. 2 Louisiana Court Record. 9304.)

During the Louisiana District Court trial, the defendants produced a form which indicated that Garner had resigned. Garner alleges that this form was fraudulent since it was proven in the trial that Garner had not signed or authorized a resignation to the State Board of Education. Nevertheless the Louisiana District Court ruled:

> "The evidence supports the defendant's position that the director had the authority and ample cause to suspend Garner for failure to comply with the director's orders. Nevertheless, it is obvious that the resignation was a

subterfuge and in reality was a substitute for what was in fact a dismissal for cause."

"It appears, therefore, that there is no law which spells out the authority or manner of dismissal of teachers at Vocational and Technical Schools. Consequently, his employment was subject to termination at any time and in any manner authorized or approved by the State Board of Education."

This judgment was affirmed by the First Circuit Court of Appeals and a Writ of Review was denied by the Louisiana Supreme Court.

Garner then realized that not only did the defendants deprive him of rights secured to him by the Constitution and laws of the United States, but also the Courts of the State of Louisiana.

Appellant Garner filed in his own behalf a complaint for Injunctive Relief, and for damages in the United States District Court for the Middle District of Louisiana.

The defendants did not answer the petition. After twenty (20) days had lapsed, the plaintiff applied for an entry of default; this was filed by the Clerk of Court.

The defendants filed a Motion to Dismiss on the grounds of res judicata. The plaintiff answered defendant's motion to dismiss and filed Judgment by Default against defendants.

Garner's Motion of Judgment by Default was denied and defendant's Motion to Dismiss was granted. The case was dismissed. Appellant filed Notice of Appeal.

REASONS FOR GRANTING THE WRIT

Garner was suspended and fired for refusing to take a "general aptitude" test. This test was not given to all teachers in the Vocational Technical School system, and it was not shown to have any manifest relation to job performance.

In the case of *Bettye Joe Baker, et al. v. Columbus Municipal Separate School District, et al.*, 329 F. Supp. 706 (1972), the Court found that a test which is not shown to have a manifest relation to job performance, and is not fairly applied to all teachers, is unlawful under the equal protection clauses of the Fourteenth Amendment.

The acts of suspending and firing the appellant Garner for refusing to take a general aptitude test was unlawful and deprived him of his equal protection rights secured to him by the Fourteenth Amendment.

FRAUDULENT RESIGNATION

The appellant testified in State District Court that he did return to work at the school on the first day after the five day suspension. This testimony is verified by the testimony of Joe L. Gregory, the account clerk at the school, who on orders of the school director, asked appellant to leave the school grounds. P. 124, Louisiana Court Record 9304.

There is no doubt that Reed, the school director, had every intention of firing the appellant, because the director testified on questioning by appellant's attorney:

"Q. Did you intend for him to remain suspended or come back to work?

"A. I intended that Mr. Garner would either follow the orders that were given to him or be fired or be terminated, if you want to use that term. P. 89, Louisiana District Court Record 9304.

RACIAL DISCRIMINATION

A white instructor in the same vocational technical school system (trade) as appellant, was fired in a similar manner as was appellant. The Louisiana State Board of Education rescinded that resignation and placed said teacher back on the job pending a full investigation. P. 00007, Record on Appeal No. 73-3233.

Those who stand in substantially the same position with respect to the law should be treated alike.

This evidence proves unconstitutional discrimination against the appellant and violated his rights guaranteed him by the Fourteenth Amendment, that of equal protection and due process.

DUE PROCESS

The right of employees to a prior hearing has been recognized by the United States Supreme Court in a variety of cases. In *Slochower v. Board of Higher Education*, 305 U.S. 551 (1956), the Court recognized the right of a city college professor to a hearing prior to his discharge. *In Slochower*, the Board argued that discharge was automatic under the statute and thus, there was no right to notice, hearing or the opportunity to be heard. The Court in recognizing the right of the agency as an employer to make reasonable rules held

that constitutional protection extends to arbitrary, discriminatory exclusion from public employment. The Court said "this arbitrary type of action goes to the essence of due process protection which is guaranteed by the constitution through the Fourteenth Amendment."

In *Voight v. Webb*, 47 F. Supp. 743, where the Court stated:

> "That [Fourteenth] Amendment governs any action of a State; whether through its legislative, through its courts, or through its executive or administrative officers."

See *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970), a case involving a college instructor where the Court stated:

> "The substance of due process requires that no instructor who has an expectancy of continued employment be deprived of that expectancy by mere ceremonial compliance with procedural due process. While he has no right to continue public employment, such a teacher may neither be dismissed or not rehired for constitutionally impermissible reasons such as race, religion, or the assertion of rights guaranteed by law or the constitution."

In *C. F. Tichon v. Harden*, 438 F.2d 1396 (2nd Cir. 1971), the court reiterated the requirement of a "due process" hearing when effects of the discharge may destroy the employee's future in his chosen occupation by damaging his reputation.

There can be no doubt that the chilling effect of the action of the defendants has damaged the reputation of the appellant, which precludes him from pursuing employment in his chosen profession.

LOUISIANA STATE COURTS

The State District Court stated:

> "There is no substantive law relating to the exact question before the Court. LSA-R.S. 17:10 does provide that the State Board of Education shall administer the affairs of the institutions listed which include the Evangeline Area Tri-Parish Vocational School; L.S.A.-R.S. 17:11 states that the State Board of Education shall prescribe the qualifications and certifications of teachers.... Section 441-444 relate to teachers' tenure law, but it's clearly inapplicable to the case under consideration inasmuch as a "teacher" within this intendment of the act has been defined as an employee of any parish or city school, and further a teacher enjoys no rights under the tenure act who holds only a "T" certificate as in the case herein."

On Page 41, Louisiana Court Record 9304. it was shown that appellant did hold a "Regular" teachers certificate. On P. 44, that appellant had worked for the vocational school system from November 15, 1965 to May 28, 1969—a period of three and one-half years. P. 47, 48, 49, Louisiana Court Record 9304, appellant testified and read a letter into the record which offered evidence that appellant had attempted to determine whether or not he was certified to teach and what to do if he was not. This letter was dated April 1968, and at that time the appellant had already completed the necessary nine (9) semester hours needed to validate appellant's "Regular" teacher's certificate. By May of 1968, he had completed three (3) more semester hours. P. 64, 65, Record 9304. The State chose to recognize only the "T" Certificate which appellant had never seen and had no knowledge of. P. 69, Record 9304.

Since the appellant had worked for more than three and one-half years, he possessed a "Regular" teacher's certificate and the hours needed to revalidate it—the action of the State Courts in ruling that appellant did not come under the teacher "tenure" act was arbitrary any capricious. It discriminated against appellant and deprived him of equal protection under the Fourteenth Amendment.

Not only was Garner deprived of equal protection, but all teachers in the State of Louisiana who are classed as vocational-technical school teachers are deprived of equal protection.

The Louisiana State District Court ruled:

> "It appears, therefore, that there is no law which spells out the authority or manner of dismissal of teachers at Vocational and Technical schools."

Nevertheless, there are laws to govern and protect other public school teachers.

In the case of *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court said:

> "The basis of classification must in general be so drawn that those who stand substantially in the same position with respect to the law are treated alike."

RES JUDICATA

The Congress of 1871 provided an act to protect all persons in the United States in their civil rights and to furnish the means of their vindication. In this instance, the ap-

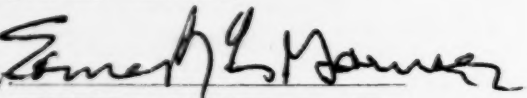
pellant has supplied alleged evidence which has been documented in the Record, Louisiana District Court Record 9304.

To bar Garner's Federal Court civil rights complaint on the grounds of res judicata is to make meaningless the actions of the Congress of 1871 and Section 1343 Title 28 of the United States Code.

CONCLUSION

For these reasons, petitioner Ernest L. Garner, in his own behalf prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals, Fifth Circuit, rendered in these proceedings on February 7, 1974.

Respectfully submitted,

By 

ERNEST L. GARNER, Pro SE
8957 Scenic Highway
Baton Rouge, Louisiana 70807
775-5631

CERTIFICATE OF SERVICE

I hereby certify that 3 copy of the above and foregoing petition for a Writ of Certiorari has been mailed this day, postage prepaid, to Mr. William T. Reeves, Jr., Special Counsel, P. O. Box 44005, Capitol Station, Baton Rouge, Louisiana.

Baton Rouge, Louisiana, this 7th day of May, 1974.

Ernest L. Garner

APPENDIX A

ERNEST L. GARNER

versus

THE LOUISIANA STATE BOARD OF EDUCATION, ET AL.

NUMBER 151,195 — DIVISION "F"

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT

This is a suit on a contract of employment. The plaintiff contends that he was employed by the Department of Education of the State of Louisiana on November 15, 1965, as an auto mechanic instructor at the Evangeline Area Tri-Parish Vocational Technical School. He avers that on June 3, 1969, he was advised by the school's director, Elijah Reed, that his "services" were to be terminated as of June 30, 1969. He contends that the operation of vocational technical schools and the term of office of the teachers are controlled solely by the State Board of Education and the sole authority for employment and termination rests with that body. Therefore, he claims he is still employed by the school because the contract between himself and the defendants has never been revoked, and as such, he is entitled to all back pay due him including specific performance of the contract.

Defendants on the other hand, contend that the plaintiff was not terminated but that he was only suspended for failure to follow instructions. They further claim that he failed to return to work after his suspension and that for this reason they considered that he had in effect resigned and this was the basis upon which his termination was disposed of by the

State Board of Education. But, their most serious argument, and the one which deserves meritorious consideration, is that the plaintiff's Vocational Technical certificate had expired and consequently, his employment could be terminated at any time and he had no contract to enforce.

There is very little dispute regarding the facts of the case, although the respective parties may view them from a different perspective. It appears that on November 15, 1965, the plaintiff was hired as an "Instructor" in automobile mechanics at an annual salary of $6,697.60. Initially, the plaintiff was issued a Type T. (temporary) Trade Certificate making him eligible to teach auto mechanics. (Exhibit DE-5) This certificate was valid for the period commencing November 5, 1965, until November 5, 1966. It appears that the certificate was extended to April 3, 1967, and from November 5, 1967, to November 5, 1968. After the latter date, there is no evidence that Mr. Garner had a valid certificate authorizing him to teach; however, he was permitted to continue teaching and his employment was regular until May 28, 1969, when he was suspended by Mr. Elijah Reed, the school's director, for failure to take a "general aptitude" test. On June 2, 1969, Reed wrote Garner a letter in which he informed Garner that the suspension would remain in effect until the plaintiff complied with the director's order to take the test. However, the next day, June 3, 1969, Reed advised Garner that his services would be terminated effective June 30, 1969. After no answer, the director submitted a resignation form to the State Board and thereafter, the resignation was approved by the Board.

The evidence supports the defendants' position that the director had the authority and ample cause to suspend Garner for failure to comply with the director's orders. Nevertheless, it is obvious that the "resignation" was a subterfuge and in reality was a substitute for what was in fact a dismissal for cause.

There is no substantive law relating to the exact question before the Court. LSA-R.S. 17:10 does provide that the State Board of Education shall administer the affairs of the institutions listed which include the Evangeline Area Tri-Parish Vocational Technical School. LSA-R.S. 17:11 states that the State Board of Education shall prescribe the qualifications and certification of teachers.

Section 430 provides that a vocational teacher's certificate is revoked if he instructs a class in violation of the laws and constitution of the State or in violation of the Board's policy, rules and regulations, and that the teacher shall not be paid if he does not have a valid teacher's certificate. Sections 441-444 relate to the teacher's tenure law, but it is clearly inapplicable to the case under consideration inasmuch as a "teacher" within the intendment of the act has been defined as an employee of any parish or city school board, and further, a teacher enjoys no rights under the tenure act who holds only a "T" certificate as is the case herein.

It appears, therefore, that there is no law which spells out the authority or manner of dismissal of teachers at vocational and technical schools. (The Court is of the opinion that upon the expiration of Garner's temporary teacher's certificate, he had no contract and continued to teach merely at the sufferance of the State Board of Education. Consequently, his employment was subject to termination at any time and in any manner authorized or approved by the State Board of Education. He was paid for the remainder of the month of June, 1969, after a reasonable notice of termination and **is due no further compensation.**

Therefore, for the reasons expressed herein, judgment is rendered in favor of the defendants, The Louisiana State Board of Education and The Louisiana Department of Edu-

cation, and against the plaintiff, Ernest L. Garner, Jr., dismissing his suit at his costs.

Judgment will be signed accordingly.
Baton Rouge, Louisiana, this 3rd day of November, 1972.

LEWIS S. DOHERTY, III, JUDGE
Division F
19th Judicial District Court

Filed November 3, 1972.

APPENDIX B

ERNEST L. GARNER

Plaintiff-Appellant

versus

THE LOUISIANA STATE BOARD OF EDUCATION, ET AL.

Defendant-Appellees

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA
NUMBER 9304

On Appeal from the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, Honorable Lewis S. Doherty, III, Judge Presiding

BEFORE: SARTAIN, BLANCHE AND WATSON, JJ.

SARTAIN, J.

This is a suit by plaintiff for back pay and specific performance of an alleged contract of employment. Plaintiff appeals from a judgment of the District Court in favor of defendants.

There is little dispute regarding the relevant and material facts of this case. On November 15, 1965, plaintiff was hired as an instructor of auto mechanics at the Evangeline Area Tri-Parish Vocational Technical School at an annual salary of $6,697.60. At that time plaintiff held an undergraduate degree in Industrial Arts Education from Southern University. He was issued a Type "T." (temporary) Trade Certificate by the State Department of Education, thereby making him eligible to teach auto mechanics in a state industrial school. This certificate was valid from November 5, 1965, until November 5, 1966. The validity of this temporary certificate was first extended until April 3, 1967, and then it was extended once

again from November 5, 1967 until November 5, 1968. It appears that after November 5, 1968, plaintiff's temporary certificate was not extended, and after that date he had no valid certificate authorizing him to teach in industrial trade schools.

Plaintiff was permitted to continue to teach until May 28, 1969, when he was suspended by Mr. Elijah Reed, Director of the Evangeline Area Tri-Parish Vocational Technical School, for failure to take a general aptitude test administered to all faculty members at the school. Plaintiff was informed by letter that his suspension would remain in effect for five days during which time he should comply with the Director's order to take the test. Without having taken the test plaintiff returned to the school on June 3, 1969, and attempted to resume his teaching duties. He was then informed that since he had failed to comply with the terms of his suspension and had returned to the school without taking the test, his services would be terminated as of June 30, 1969. Plaintiff was requested by letter dated June 3, 1969, to return to the school for the purpose of checking in his equipment before the termination date, but he never returned. The school's Director, Mr. Reed, assuming that plaintiff had quit, then proceeded to submit a resignation form for plaintiff to the State Board of Education which approved the resignation.

Plaintiff filed suit on August 19, 1971, alleging that since the State Board of Education had the sole authority for termination of his employment, then his employment contract had never been revoked and he was entitled to back pay and specific performance of the contract. The trial court held that even though the submission of plaintiff's resignation was in fact a substitute for his dismissal by Mr. Reed, his contract of employment as a teacher in the industrial trade schools of this state had lapsed when his certification had not been renewed, thereby rendering his employment subject to termination at any time and in any manner approved by the State Board of Education.

Plaintiff contends that the trial court erred in holding his termination legal and authorized and in holding that he had no contract of employment due to the failure to renew his temporary certificate.

The pivotal issue presented by this appeal is whether plaintiff's employment was terminated by the proper authority and in a legal manner.

L.R.S. 17:10 provides that the State Board of Education shall administer the affairs of the various educational institutions listed therein, including the Evangeline Area Tri-Parish Vocational Technical School. L.R.S. 17:411 provides in pertinent part as follows:

> "The State Board of Education shall prescribe the qualifications and provide for the certification of the teachers of elementary, secondary, trade, normal and collegiate schools. * * * "

While there are specific removal regulations and procedures for teachers covered by the Teacher Tenure Law (R.S. 17:443), for teachers of Orleans Parish (L.R.S. 17:462), for teachers employed in State Institutions (L.R.S. 17:471), for school bus operators (L.R.S. 17:493), and for employees of Orleans Parish Schools other than teachers (L.R.S. 17:523), the only provision relating to removal of teachers and instructors in state-operated trade and vocational schools is that contained in L.R.S. 17:430. This statute provides for revocation of a vocational teacher's certificate if the teacher instructs a class in violation of the laws of this state or in violation of the rules and regulations of the State Board of Education. L.R.S. 17:430 further provides that a teacher in vocational and trade schools shall not be paid if he does not have a valid teacher's certificate. The statute does not set up any procedure to be followed in removal of such a teacher and, therefore, we must concur in the statement made by the judge a quo in his written reasons for judgment that: ". . . there is no law which

spells out the authority or manner of dismissal of teachers at vocational and technical schools."

According to the testimony of plaintiff, he filled out an application blank for the job in November of 1968 and returned it to Mr. Reed. He stated that Mr. Reed was the only person he contacted about the job but that it was his understanding that the application for the job would have to be approved by the State Board of Education. Plaintiff further testified that during the course of his employment he pursued some eighteen semester hours in order to maintain his temporary trade teacher's certificate and in order to obtain a permanent certificate in the vocational field. Plaintiff also stated that he had received his undergraduate degree in 1950 after fulfilling the requirements of an industrial education curriculum contained in the Southern University Bulletin. Based upon this degree, plaintiff asserts that he had Type "C" general teacher's certificate which could have been valid at the time of his dismissal. Plaintiff also contends that at the time of his dismissal he did not submit a resignation nor did he authorize Mr. Reed to submit one for him.

Dr. James DeLee, Director of Teacher Certification with the State Department of Education, testified that the temporary "T" certificate was the only certificate ever issued to plaintiff in the vocational field by the State Department. According to Dr. DeLee, in order to maintain the validity of this certificate a minimum of three semester hours of Professional Vocational Education courses would have to be taken each year until fifteen hours were earned. Upon examination of plaintiff's transcript, Dr. DeLee stated that several of the courses taken by plaintiff would not be counted toward fulfilling these requirements as the courses were not in Professional Vocational Education, and thus, at the time of his dismissal plaintiff did not possess the required qualifications necessary to keep his temporary certificate valid. Dr. DeLee also stated that a type "C" general teacher's certificate would only

qualify the holder thereof to teach in the public secondary schools and would not certify the holder to teach in the vocational trade schools of this state.

Mr. Elijah Reed, Director of the school, testified that he hired plaintiff in 1965 subject to the approval of the State Board. Mr. Reed stated that he knew plaintiff had not taken the required courses to maintain the validity of his temporary certificate and that he had repeatedly brought this to plaintiff's attention. Mr. Reed further stated that when plaintiff did not fulfill the terms of his suspension of May 28, 1969 by taking the general aptitude test administered to the faculty of the school before returning to work, it was his impression that plaintiff had quit. Mr. Reed testified that after the letter of June 3, 1969, plaintiff did not answer any correspondence sent to him and he did not return to the school. It was on this basis that Mr. Reed assumed plaintiff had quit and thus he sent in the resignation form to the State Department. Mr. Reed further testified that he knew of no form or procedure to follow when an employee quit or was dismissed for cause, and that he used the resignation form to terminate plaintiff's employment for lack of anything else to use, even though plaintiff had never submitted a resignation nor authorized Mr. Reed to send in a resignation for him.

Mr. Witney A. Langlois, Director of Vocational Education for the State Department of Education at the time, testified that he knew of no form or procedure for termination of non-tenure employees other than the resignation form. He further stated that it was his understanding that the individual directors of the various vocational schools had the authority to hire and fire employees such as plaintiff subject to Board approval.

In passing on this issue the trial judge in his written reasons for judgment stated:

"The evidence supports the defendants' position that the

director had the authority and ample cause to suspend Garner for failure to comply with the director's orders. Nevertheless, it is obvious that the 'resignation' was a subterfuge and in reality was a substitute for what was in fact a dismissal for cause."

However, the trial court went on to hold that upon expiration of plaintiff's temporary certificate in November of 1968, he had no contract of employment, and plaintiff's employment was subject to termination at any time and in any manner authorized by the State Board of Education.

In view of the testimony to the effect that Mr. Reed, as Director of the school, had the authority to hire and fire employees such as plaintiff subject to Board approval, we hold that the trial court committed no error in upholding the termination of plaintiff's employment.

We find the instant matter analogous to the situations presented in the cases of *Smith v. Union Parish School Board*, 228 La. 570, 83 So.2d 131 (1955) and State ex rel *Sibley v. Ascension Parish School Board*, 222 La. 923, 64 So. 2d 221 (1953). In both of those cases it was held that a teacher who possesses only a temporary "T" certificate could be dismissed without a hearing and without following the procedures for dismissal contained in the Teachers' Tenure Act. See also: *Barnette v. Bienville Parish School Board*, 223 La. 614, 66 So. 2d 569 (1953); *Hill v. Caddo Parish School Board*, 250 So.2d 446 (2nd La. App. 1971). It has also been stated that where a teacher lacks the statutory qualifications to teach, notice and hearing before dismissal are unnecessary because the contract of employment is void ab initio. 78 C.J.S., Verbo "Schools and School Districts," § 204, at pgs. 1092-1093.

Even were we to hold that plaintiff's contract of employment continued fully in effect, even though his temporary certificate expired as of November 5, 1968, such contract would only have been in effect for an indefinite period, during which

time plaintiff was employed merely at the sufferance of the State Board of Education. It is well established that a contract of employment for an indefinite peroid is terminable at will by either the employee or employer, and the employee may be discharged at any time with or without cause. See *Baker v. Union Tank Car Company*, 140 So.2d 397 (1st La. App. 1962) and the cases therein cited.

To summarize, we find that plaintiff's termination came as a result of his failure to follow the orders of his supervisor, Mr. Reed, by refusing to take the general aptitude test administered to the entire faculty of the school. Mr. Reed was then faced with the situation of seeking to dismiss plaintiff but without any procedural guidelines to follow. While the submission of the resignation form by Mr. Reed was in our view highly irregular, absent any authorization from plaintiff, we hold that at that time plaintiff was continuing in his employment merely at the sufferance of the State Board of Education since he lacked the requisite certification, and thus, his employment could be legally terminated at any time and in any manner approved by the State Board of Education.

Accordingly, for the above reasons, the judgment of the District Court is affirmed at appellant's costs.

AFFIRMED.

APPENDIX C

ERNEST L. GARNER

versus

THE LOUISIANA STATE BOARD OF EDUCATION, ET AL

NO. 53,682

In re: Ernest L. Garner applying for Certiorari, or Writ of Review, to the Court of Appeal, First Circuit, Parish of East Baton Rouge.

Writ denied: We find no error of law.

/s/ AT Jr.
/s/ JWS
/s/ FWS
/s/ JAD
/s/ PFC
/s/ WFM

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
June 29, 1973

/s/ Phil Trice

Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY: SEPTEMBER 7, 1973 **WEST, J.**

ERNEST L. GARNER

versus

LOUISIANA STATE BOARD OF EDUCATION, ET AL

CIVIL ACTION NUMBER 73-216

This matter is before the Court on the motion of the plaintiff for a "Final Judgment of Default" and on the motion of the defendant to dismiss this case. No oral argument is required on these motions.

This suit was filed by the plaintiff in this Court on June 12, 1973, alleging Title 42, United States Code, Section 1983 and Title 28, United States Code, Section 1343 as grounds for jurisdiction. The plaintiff seeks injunctive relief and monetary damages, and grows out of what the plaintiff contends was an illegal discharge from his job as a teacher employed at the Evangeline Tri-Parish Vocational Technical School in St. Martin Parish.

As shown by this record, including the filed exhibits, this plaintiff filed a suit, based on the same facts alleged in this suit, in the Nineteenth Judicial District Court for the State of Louisiana on August 19, 1971. That case involved the same plaintiff and the same defendants. That case was tried by the State Court and for written reasons assigned a judgment was rendered defendant. An appeal was taken, and the Louisiana First Circuit Court of Appeal affirmed the Trial Judge's decision. See *Ernest L. Garner v. Louisiana State Board of Education, et al*, 277 So.2d 492. Writs were applied

for and denied by the Louisiana Supreme Court. Thus the entire matter has been duly adjudicated in the State Courts. But the plaintiff now claims that this suit filed here arises under Title 42, United States Code, Section 1983, and that violation of that statute was not pursued in the State Court. However, the plaintiff is a little inconsistent in that in his answer to the defendant's motion to dismiss he states that "the plaintiff does not claim racial discrimination in this suit."

A reading of this complaint, and a comparison with the complaint tried in the State Court reveals that there is no significant difference between the cause of action pursued in the State Court and the Cause of action which the plaintiff attempts to pursue here. It is the substance of the claim that must be considered rather than the title given to it. In *Frazier v. East Baton Rouge Parish School Board*, 363 F.2d 861 (CA 5-1966), the Fifth Circuit Court of Appeals stated:

> "If state administrative action is first challenged in the state courts, and the state courts act judicially, the state court decision is res judicata and bars a decision by a federal court. (Citations omitted.) Under the doctrine of res judicata, where the second action is based upon the same cause of action as that upon which the first action was based, the judgment is conclusive as to all matters which were litigated or might have been litigated in the first action. Therefore the decision of the state court of appeal, acting judicially, is a bar to Frazier's claim in the federal district court even though he raises his federal claim of discrimination for the first time in the federal court. In these circumstances, once Frazier submitted his challenge to state administrative action to state judicial review, the only appropriate federal forum for review of alleged federal claim of discrimination was the United States Supreme Court. He by-passed that opportunity. The district court therefore correctly determined that it had no jurisdiction."

For these reasons:

IT IS ORDERED that the plaintiff's motion for a judgment by default be, and it is hereby DENIED, and

IT IS FURTHER ORDERED that the defendant's motion to dismiss on the grounds of res judicata be, and it is hereby GRANTED, and this case is hereby DISMISSED.

UNITED STATES DISTRICT JUDGE

APPENDIX E

ERNEST L. GARNER, Plaintiff-Appellant,

versus

LOUISIANA STATE BOARD OF EDUCATION, ET AL, Defendants-Appellees.

No. 73-3233
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Feb. 7, 1974.

Teacher employment case. The United States District Court for the Middle District of Louisiana, at Baton Rouge, E. Gordon West, J., dismissed the complaint, and plaintiff appealed. The Court of Appeals held that prior state court decision was a bar, under doctrine of res judicata, to federal court action.

AFFIRMED.

Judgment 328(3.10)

State court decision in teacher employment case was a bar, under doctrine of res judicata, to subsequent federal court complaint asserting grounds which were, or might have been, litigated in state court proceedings.

Appeal from the United States District Court for the Middle District of Louisiana.

Before COLEMAN, DYER and RONEY, Circuit Judges.

*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409 Part I.

PER CURIAM:

This is a teacher employment case which has been litigated in the state courts, to and through the court of last resort. The aggrieved vocational technical teacher then attempted to renew the litigation in the federal courts, asserting grounds which were, or might have been, litigated in the state court proceedings. The District Court dismissed the complaint. We affirm under the authority of *Frazier v. East Baton Rouge Parish School Board*, 5 Cir., 1966, 363 F.2d 861.

AFFIRMED.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 73-3233

ERNEST L. GARNER,

Plaintiff-Appellant,

versus

LOUISIANA STATE BOARD OF EDUCATION, ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Louisiana

ON PETITION FOR REHEARING
(March 5, 1974)

Before COLEMAN, DYER and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.